

## SECTION 26

Section 26 of the Act provides that if the court having jurisdiction over the proceedings determines that the proceedings in respect of a claim have been instituted or continued without reasonable ground, the cost of the proceedings shall be assessed against the party who has so instituted or continued the proceedings.

### Digests

Neither the deputy commissioner, administrative law judge nor the Board has the authority to impose costs under Section 26; costs under Section 26 can only be assessed upon review by the court of appeals or upon enforcement of an order by the district court. Section 26 implicitly precludes a sanction for bad faith claims under Rule 11 of the Federal Rules of Civil Procedure. *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132 (CRT) (9th Cir. 1993).

The Fifth Circuit follows *Brickner* and holds that only courts, and not administrative agencies, have authority to impose costs under Section 26. The court also agrees that application of Rule 11 is precluded. *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995), *aff'g on other grounds* 24 BRBS 84 (1990).

The Board holds that attorney's fees cannot be assessed against any party as costs under Section 26 because the Act specifically provides in Section 28 under what circumstances attorney's fees can be assessed, and because Section 26 makes no express provision for an award of an attorney's fee. To the extent that the Board's two Medrano decisions are inconsistent with this holding, they are overruled. The Board further holds that, contrary to the administrative law judge's finding, that the Director's conduct in opposing Section 8(f) relief in the early stages of the proceedings was not vexatious and oppressive because he had a legal and factual basis for his opposition. The case is remanded for a determination of whether employer is liable for claimant's attorney's fees. Toscano v. Sun Ship, Inc., 24 BRBS 207 (1991). See also Bordelon v. Republic Bulk Stevedores, 27 BRBS 280 (1994); Steed v. Container Stevedoring Co., 25 BRBS 210 (1991).

Attorney's fees are generally not recoverable as costs in the absence of a statutory provision or enforceable contract. Section 26 makes no reference to attorney's fees, and the Board holds that employer is not entitled to payment of its attorney's fees by claimant under Section 26 based on the facts in this case. Mackey v. Marine Terminals Corp., 21 BRBS 129 (1988).



The Board holds that Section 26 requires the presiding tribunal to determine whether, from a pre-hearing perspective, the party had a reasonable likelihood of prevailing. The case is remanded for the administrative law judge to consider whether imposition of Section 26 costs is appropriate as the issue was raised below. Bolden v. U.S. Stevedores Corp., 18 BRBS 172 (1986).

When applying Section 26, an administrative law judge must determine whether, from a pre-hearing perspective, the party against whom costs would be assessed had some reasonable basis for initiating or pursuing the claim. The test is an objective one, requiring consideration of whether the evidence could justify the relief requested. In this case, the Board reverses the administrative law judge's imposition of costs against claimant, holding that claimant had a reasonable ground for pursuing a claim for disability benefits despite increased earnings because he could have had a loss in wage-earning capacity. Moreover, failure to comply with the reporting requirements of Section 8(j) cannot be the basis for imposition of Section 26 costs because Section 8(j) contains its own penalty and the criminal provisions of Section 31(a) may apply. Freiwillig v. Triple A South, 23 BRBS 371 (1990).

The Board affirms the imposition of employer's costs, not including attorney's fees, against claimant pursuant to Section 26 because the administrative law judge rationally concluded that, from an objective pre-hearing perspective, a doctor's report provided no basis for Section 22 modification for a change in condition, and claimant also had no basis for modification based on a mistake in fact in his post-injury wage-earning capacity. Zepeda v. National Steel & Shipbuilding Co., 24 BRBS 163 (1991).

The Board reverses the administrative law judge's imposition of attorney's fees as costs against the Director pursuant to Section 26, as it was employer's actions that necessitated a hearing, regardless of the merits of the Director's position in denying Section 8(f) relief. The Director is held to the same standard as other parties in relation to Section 26, that is, whether, from a pre-hearing perspective there was some reasonable ground for initiating or pursuing the claim. Rihner v. Boland Marine & Manufacturing Co., 24 BRBS 84 (1990), aff'd on other grounds, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995).

The Board remands the case to the administrative law judge to determine whether attorney fees can be assessed against the Special Fund as costs under Section 26 where the Director's non-participation caused unnecessary litigation. Such a result should be limited to cases where no issues were ever contested between claimant and employer, all payments have been voluntarily made, and all of the administrative law judge's findings are supported by the uncontradicted evidence of record. Medrano v. Bethlehem Steel Corp., 18 BRBS 229 (1986).

On appeal after remand, the Board reverses the administrative law judge's imposition of attorney's fees as costs against the Director because it was employer's failure to stipulate to claimant's entitlement to benefits, a prerequisite for Section 8(f) relief, that necessitated a hearing. Moreover, the Director's failure to participate at the informal conference or formal hearing is not tantamount to his instituting or continuing proceedings without reasonable ground because his participation generally is not mandated. Medrano v. Bethlehem Steel Corp., 23 BRBS 223 (1990).

Claimant's counsel is not a "party" for purposes of Section 26, as he is not "necessary" for a formal hearing, nor is he an entity who sought relief or against whom relief was sought. Therefore, Section 26 cannot be utilized by the administrative law judge to assess an employer's attorney's fees and costs against claimant's counsel. Fletcher v. Slattery Associates, 22 BRBS 70 (1989).

The Board rejects employer's contention that the Director is liable for its attorney's fees and costs under Section 26, because the Board finds that Director's arguments on appeal are reasonable. Stone v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 1 (1987).

Employer's argument that it is entitled to Section 26 costs for proceedings before the Board is rejected inasmuch as the Board reversed the administrative law judge's finding that claimant's entitlement to compensation and medical benefits under the Act is barred under Section 33(g). Pinell v. Patterson Service, 22 BRBS 61 (1989), *aff'd on other grounds mem.*, 20 F.3d 465 (5th Cir. 1994).

The Board held that, as a matter of law, sanctions under Section 26 of the Act were unavailable where the legal theory advanced by the claimant (that an enforceable Section 8(i) settlement should be viewed as existing where the employee died during settlement negotiations) was not so unreasonable as to warrant imposition of employer's costs, at either the administrative law judge level or the Board level of the proceedings, on the claimant. Thus, any error on the part of the administrative law judge in failing to address Section 26 was regarded as harmless. Fuller v. Matson Terminals, 24 BRBS 252 (1991).

The Board rejects employer's motion that its costs be assessed against claimant pursuant to Section 26, as there is no evidence that claimant continued the claim without a good faith, reasonable basis. Moreover, the case was not groundless in that it raised a novel issue. Olsen v. General Engineering & Machine Works, 25 BRBS 169 (1991).

The Board held that any error committed by the administrative law judge by failing to

address the issue of Section 26 was harmless, as neither the Board nor an administrative law judge has the authority to award fees and costs under Section 26. *Henry v. Coordinated Caribbean Transport*, 32 BRBS 29 (1998), *aff'd*, 204 F.3d 609, 34 BRBS 15(CRT) (5th Cir. 2000).

The Board held that the administrative law judge acted outside his authority in finding the Director liable for an attorney's fee pursuant to Section 26. It is well-established that the Special Fund cannot be held liable for an attorney's fee under Section 28, and neither the Board nor an administrative law judge has the authority to award fees and costs pursuant to Section 26. *Terrell v. Washington Metropolitan Area Transit Authority*, 34 BRBS 1 (2000).

The Board affirms the administrative law judge's denial of employer's request for fees and costs for the proceedings against Brad Valdez as costs under Section 26 can be assessed only by a court of appeals or upon enforcement of an order by the district court. *Valdez v. Crosby & Overton*, 34 BRBS 69, *aff'd on recon.*, 34 BRBS 185 (2000).

The Board denies employer's motion for attorney's fees and costs against claimant pursuant to Section 26 since the Board does not have the authority to assess such fees and costs. *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997), *aff'd on recon. on other grounds*, 32 BRBS 56 (1998), *aff'd mem.*, 117 F.3d 484 (9<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1052 (1999).

